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No. 84-1378

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PAUL RENARD,

Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., a corporation, CBS INC., a corporation, ROOSEVELT UNIVERSITY, a not-for-profit corporation, SUSAN ANDERSON, ROBERT WALLACE, HARRY PORTERFIELD, JAMES HATFIELD and SALLY BAUER,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

BRIEF OF RESPONDENTS COLUMBIA BROADCASTING SYSTEM, INC., CBS INC., SUSAN ANDERSON, ROBERT WALLACE, HARRY PORTERFIELD, JAMES HATFIELD and SALLY BAUER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decisions of the courts below, dismissing Petitioner's amended complaint for failure to state a cause of action, and affirming that dismissal, based completely on dispositive state law issues, rest upon adequate, independent non-federal grounds.

2. Whether Petitioner's contentions that the trial court's dismissal of his action and the appellate court's affirmance of that dismissal violated his due process rights or denied him equal protection of the laws are frivolous.

IDENTIFICATION OF PARTIES PURSUANT TO SUPREME COURT RULES 28.1 AND 34.2

Petitioner is Paul Renard, an Illinois citizen. Respondents are Susan Anderson, Robert Wallace, Harry Porterfield, James Hatfield, their employer, CBS Inc., Sally Bauer, and her employer, Roosevelt University.[1] Respondent Columbia Broadcasting System, Inc. is a wholly-owned subsidiary of Respondent CBS Inc. Excluding CBS Inc.'s other wholly-owned subsidiaries, the following companies are subsidiaries or affiliates of CBS Inc.: April Music Publishing Company (Proprietary) Limited; Entertainment Distributors Company Pty. Limited; Music Publishing Co. of Australia Pty. Limited; N.S. Beaujolais Music, Inc.; N.S. Justinian Music, Inc.; Golden Apple Music, Inc.; CBS Affiliated Catalog Inc.; CBS Feist Catalog Inc.; CBS Hastings Catalog Inc.; CBS Miller Catalog Inc.; CBS Robbins Catalog Inc.; CBS U Catalog Inc.; CBS Unart Catalog Inc.; CBS Variety Catalog Inc.; United Artists Music (Australia) Pty. Limited; United Partnership Limited; United Artists Music (France) S.A.; United Artists Musik GmbH; Phonix Musikverlag GmbH; United Artists Music (Nederland) B.V.; Edizioni Musicali United Artists (Italy) S.r.l.; Resolute Casa Editrice Musicali S.r.l.; United Artists Music Japan Inc.; United Artists Musikforlag AB; United Artists Music (South Africa) Pty. Limited; Grammofonselskabs Distributions Centralen A/S; CBS Epic (Thailand) Limited; CBS Music (Thailand) Limited; CBS/FOX Company, The [General Partnership]; CBS/FOX VIDEO

[1] Roosevelt University is represented by other counsel.

(Holdings) Ltd.; CBS/FOX VIDEO Limited; CBS/FOX VIDEO (Germany) GmbH; CBS/FOX VIDEO (South Pacific) Pty. Ltd.; CBS/FOX VIDEO (Canada) Ltd.; CBS/FOX VIDEO (Espanola) S.A.; CBS/FOX VIDEO French Film Licensing Corp.; CBS/FOX VIDEO (France) S.A.; CBS/FOX VIDEO International S.A.R.L.; CBS/FOX VIDEO (New Zealand) Limited; CBS Gramophone Records and Tapes (India) Limited; CBS Disques S.A.; CBS Electronics Ltd.; Editions CBS Songs S.A.R.L.; CBS/MTM Company [General Partnership]; CBS Records Chile Ltda.; CBS Records (Kenya) Limited; PEC Musiikkitukku OY; CBS/SONY Group Inc.; SD Kansai Inc.; CBS/SONY Inc.; CBS/SONY Family Club, Inc.; CBS/SONY Records Inc.; April Music, Inc. (Japan); CBS/SONY California, Inc.; Digital Audio Disc Corporation; EPIC/SONY, Inc.; CBS/SONY Hong Kong Limited; CBS/Sony Publishing Inc.; Japan Record Distribution System, Inc.; Music Plaza, Inc.; SD Hokkaido Inc.; Shorewood Packaging Company Limited; CBS Songs Music Publishing Co. Ltd.; Editora Malograf Ltda.; Melograf S.A.; Fender Japan, Ltd.; Gramophone Record Company (Proprietary) Limited; Ideal Toy Company of Canada, Ltd.; Igaku-Shoin/Saunders Ltd.; Shorewood Packaging Corp. of Canada Limited; Trintex [General Partnership]; and Tri-Star Pictures [General Partnership].

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No. 84-1378

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OCTOBER TERM, 1984

PAUL RENARD,

Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., a corporation, CBS INC., a corporation, ROOSEVELT UNIVERSITY, a not-for-profit corporation, SUSAN ANDERSON, ROBERT WALLACE, HARRY PORTERFIELD, JAMES HATFIELD and SALLY BAUER,

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On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

BRIEF OF RESPONDENTS COLUMBIA BROADCASTING SYSTEM, INC., CBS INC., SUSAN ANDERSON, ROBERT WALLACE, HARRY PORTERFIELD, JAMES HATFIELD and SALLY BAUER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUPPLEMENTAL STATEMENT OF THE CASE

The facts are stated in the opinion of the Illinois Appellate Court, a copy of which is annexed hereto as

Appendix "A".[2] The opinion of the Circuit Court of Cook County, Illinois, includes a transcript of the broadcast out of which this action arose; the Circuit Court's opinion and the transcript are annexed hereto as Appendix "B" and "C", respectively. However, because Petitioner's statement of the case is argumentative, distorted and relies on matters outside the factual allegations of the amended complaint, we restate:

This case arises from a portion of the April 13, 1980 broadcast of "Two on Two," a weekly feature news program produced and telecast by WBBM-TV, a Chicago television station owned and operated by Respondent CBS Inc. The topic of the "Two on Two" segment (hereinafter the "broadcast") at issue was playing the piano for fun. (App. C, p. 1.) The broadcast focused on two Chicago area schools that taught piano, and surveyed the students on whether they found piano playing satisfying and fun. The first school shown in the broadcast was the Northwestern University Music School's "electronic piano lab." There, as part of a 10-week piano course, students were seen practicing "a simplified version of Brahms' 'Lullaby.' " The instructor, Joan McGraw, emphasized that the program of instruction was "purely for fun." She said that if a student had developed the potential to become a professional pianist, she would refer the student to a good teacher. (*Id.*, p. 2.) An instructor in the Northwestern program said that the 10-week program there required daily practice. (*Id.*, p. 3.) Three students in the program were interviewed briefly.

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[2] The opinion is published at 126 Ill. App. 3d 563, 467 N.E.2d 1090 (1984).

The broadcast then turned to "Music Dynamics, [a] nationwide piano school, run by [Petitioner] Paul Renard." (*Id.*) Interviewer Bob Wallace, one of the Respondents herein, noted that unlike the Northwestern program, the "Music Dynamics" program did not emphasize daily practice, and that "for many, that's one of the most attractive aspects of Music Dynamics . . . ." (*Id.*)

Renard's program, Wallace said, "teaches students to sight-read music without learning notes or scales." The broadcast included Renard's explanation of how his students learn to play piano—by picturing distances between notes on sheet music, enabling them "to play simple tunes in as few as seven hours." (*Id.*, pp. 3-4.)

Wallace then spoke briefly with three of Renard's students. The first, Peggy Ryan, said that since beginning to learn to play the organ by the "Music Dynamics" method, she had "made a lot of progress." She noted that her husband no longer put on stereo headphones to block out the sound of her playing, "so I feel I must have improved." Gaylon Sprimont, a real estate salesman, said he found the "Music Dynamics" course "very rewarding" and "exactly what I've been looking for." Sprimont said the course was ideal for him, because he did not have time to practice at home. A third student, 80 year-old Pauline Archias, was said to be "quite satisfied" with Renard's program, since her musical skills encouraged friends to visit her to hear her play the organ. "My family is so proud of me," she added. (*Id.*, pp. 4-6.)

Near the end of the broadcast, Wallace spoke briefly with Sally Bauer, one of the Respondents herein and an assistant professor of piano at Roosevelt University. Wallace said "Two on Two" consulted Mrs. Bauer because "we wondered which program might be the better for someone anxious to learn to play for fun, but also play

well." (*Id.*, p. 5.) Wallace said Mrs. Bauer was shown tapes of students from both the Music Dynamics and Northwestern music classes. Her brief comments were:

> From the tapes that we have seen of those two programs, they're without question, the musical level in the Northwestern program exceeds that of the other program. The people that you have spoken with and heard at Music Dynamics are very enthused about their work. But, I see greater independence musically in the works of the students at Northwestern. (*Id.*)

Wallace then continued:

> Mrs. Bower [sic] emphasized that the best way to judge any program is by whether it helps the student to learn to play as well as he or she wants to learn. While, a Music Dynamics student might to some ears sound a bit mechanical and lack complete musicianship, Mrs. Pauline Archias is quite satisfied. (*Id.*)

Mrs. Archias' glowing comments, described above, were then shown. The broadcast concluded, humorously: "Good luck, and kids, don't shoot the piano player, Mom and Dad are doing the best they can!" (*Id.*, p. 6.)

Petitioner's amended complaint purported to claim libel, conspiracy to libel, malicious injury to property rights, conspiracy to maliciously injure property rights, fraud and conspiracy to defraud. (App. A, p. 1; App. B, p. 2.) The Circuit Court of Cook County granted Respondents' motions to dismiss the amended complaint on June 23, 1983; Petitioner elected to stand on his amended complaint and appealed the dismissal. On August 7, 1984, the Illinois Appellate Court affirmed and the Illinois Supreme Court denied leave to appeal on November 30, 1984.

REASONS TO DENY THE WRIT

SUMMARY OF ARGUMENT

The decisions of the Illinois courts challenged by Petitioner here are supported by adequate, independent state grounds. Moreover, Petitioner's frivolous claims that he suffered a denial of due process or equal protection of the laws are transparent attempts to transform exclusive state law determinations into federal questions.

THE DECISIONS BELOW REST ON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS AND THE PETITION FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION

The Petition for Writ of Certiorari should be denied because the decisions below rest on adequate and independent state law grounds and because the Petition presents no substantial federal question. Petitioner's amended complaint attempted to allege the state law torts of libel, malicious injury to property rights, fraud and conspiracy, all of which are governed solely by Illinois law. The trial court ruled that Petitioner had failed to state a cause of action under Illinois law and held, basing its decision dismissing the amended complaint on alternative grounds, that the statements made in the broadcast were not defamatory; that the words claimed to be defamatory were not reasonably or fairly capable of the meaning assigned to them by Petitioner; that not only were the words used *capable* of an innocent construction, under Illinois law, but Petitioner's construction of them was *unreasonable*; and that, in any event, the allegedly offensive comments were nonactionable statements of opinion. (App. B, pp. 3-5.)

In examining the allegations of Petitioner's amended complaint and the language used in the broadcast, the Illinois Appellate Court held (App. A, p. 4): "We need not decide whether this allegation sufficiently pleads libel *per se* or *per quod* because plaintiff's complaint is deficient on a more fundamental level; the words are not defamatory." Thus, the Appellate Court ruled that the broadcast was not defamatory, *i.e.*, "it contained no false statements of fact injurious to plaintiff's reputation" (*id.*, p. 5), and that, alternatively, the allegedly defamatory statements were nonactionable expressions of opinion. Both the trial court and the Appellate Court held that Petitioner failed to state a cause of action on his remaining state law claims for malicious injury to property rights, fraud, and "conspiracy" to commit these various torts.

Because Petitioner fails to show that the decisions below were not based on adequate interpretations of state law by the state courts, independent of federal constitutional concerns, the Petition presents no substantial federal question and, accordingly, review by this Court is plainly unwarranted. *E.g.*, *Michigan v. Long*, 103 S. Ct. 3469, 3476 (1983); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Murdock v. City of Memphis*, 87 U.S. 590, 629 (1875). Moreover, the mere incantation of a federal constitutional question is insufficient to invoke this Court's jurisdiction unless the question is substantial. *E.g.*, *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311 (1902).[3]

As the discussion below demonstrates, this is a garden-variety libel action in which the lower courts applied well-

[3] The Court's jurisdiction here is nominally under 28 U.S.C. §1257. Petitioner incorrectly claims that the jurisdiction of this Court is invoked by "28 U.S.C. §2101(3)." (Petition, p. 2.)

established legal standards in determining that Petitioner's state law claims lacked substance. The Petition raises no substantial federal question and there is nothing in the circumstances of the broadcast, its language, its context, the lower courts' rulings or the state of Illinois law which even remotely commend this case for review by this Court.

1. The Lower Courts Properly Determined, As A Matter Of State Law, That The Language At Issue Is Not Defamatory.

Petitioner's chanting of the words "due process" and "equal protection" in criticizing the lower courts' analysis of the broadcast misapprehends the Illinois law of libel and its application in the case at bar. The lower courts applied the Illinois "innocent construction rule" as an *alternative* basis for dismissing Petitioner's amended complaint—both courts squarely held, prior to applying the rule, that the broadcast simply did not contain a false statement of fact which could be construed, under *any* circumstances, as being injurious to Petitioner's reputation, business or profession. Moreover, the trial court's ruling, affirmed by the Appellate Court, was that not only was it reasonable to construe the language of the broadcast innocently, but that Petitioner's construction was unreasonable. The authority for a court to determine, as a matter of law, whether a challenged publication is susceptible of the defamatory meaning ascribed to it by plaintiff is well-established. *See, e.g., Frinzi v. Hanson*, 30 Wis. 2d 271, 275-76, 140 N.W.2d 259, 261 (1966); *James v. Gannett Co.*, 40 N.Y.2d 415, 419, 353 N.E.2d 834, 837 (1976); *Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495, 502 (3d Cir.), *cert. denied*, 439 U.S. 861 (1978); *Franklin Music Co. v. American Broadcasting Companies, Inc.*, 616 F.2d 528, 541 (3d Cir. 1979); *Southard v. Forbes*,

Inc., 588 F.2d 140, 143 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); *Hallmark Builders, Inc. v. Gaylord Broadcasting Co.*, 733 F.2d 1461, 1464 (11th Cir. 1984); Restatement (Second) of Torts §614(b) (1977). Thus, the lower courts' decisions rest squarely on adequate and independent state grounds and no constitutional issue is presented in this Court for review.

In any event, the lower courts properly applied the "innocent construction rule" as an alternative ground mandating dismissal of Petitioner's amended complaint. The ground rules by which a broadcast or publication is to be analyzed by Illinois courts in the context of a motion to dismiss were set forth by the Illinois Supreme Court in *Chapski v. Copley Press*, 92 Ill. 2d 344, 352, 442 N.E.2d 195, 199 (1982):

> [A] written or oral statement is to be considered in context, with the words and the implications therefrom given their natural and obvious meaning; if, as so construed, the statement may reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than the plaintiff it cannot be actionable *per se*. This preliminary determination is properly a question of law to be resolved by the court in the first instance . . . .

Illinois courts apply this standard in determining whether a plaintiff has sufficiently alleged that a defendant has uttered a false and defamatory statement of fact—a matter peculiarly within the province of the state court in determining whether a plaintiff has pleaded actionable defamation. Neither the rule, nor its application by the Illinois courts in this case, creates an impermissible classification; charitably characterized, Petitioner's apparent claim that the rule creates an impermissible classification between meritorious and non-meritorious claims fails to present a substantial federal question and

should be summarily rejected. Moreover, Petitioner has no constitutionally protected interest in a jury trial where the court has determined, as a matter of law, that the publication in question does not contain a false and defamatory statement of fact. The rule does not implicate the United States Constitution in any way and, to the extent the rule may be viewed as the predicate for the decisions Petitioner challenges here, it serves as an adequate and independent state ground of decision.

Indeed, the *Chapski* decision itself embodies the Illinois Supreme Court's considered analysis of the interests which the rule is designed to accommodate. After noting the policies underlying the rule[4] and discussing several instances where courts had strained to find innocent constructions, the Court determined to modify the rule in the manner set forth above on the grounds that the modification

> would better serve to protect the individual's interest in vindicating his good name and reputation, while allowing the first amendment guarantees that "breathing space" essential to their fruitful exercise. (*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

Chapski, 92 Ill. 2d at 351-52, 442 N.E.2d at 199. Based on the Illinois Supreme Court's analysis in *Chapski*, the Illinois Appellate Court squarely rejected Petitioner's due process and equal protection arguments. (App. A, pp. 5-6.)[5]

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[4] "Perhaps the strongest reason advanced in support of the rule is that it comports with the constitutional interests of free speech and free press and encourages the robust discussion of daily affairs." Chapski v. Copley Press, 92 Ill. 2d 344, 350, 442 N.E.2d 195, 198 (1982).

[5] While Petitioner's due process and equal protection arguments were presented to and decided by the Illinois Appellate Court, Petitioner has not preserved these issues for review by this Court

(Footnote continued on following page)

Thus, the "innocent construction" rule was properly applied by the lower courts and its application raises no issue cognizable in this Court.

2. The Dismissal Of Petitioner's Claims For Fraud, Malicious Injury To Property Rights And Conspiracy Presents No Issue Cognizable In This Court.

So well-grounded in Illinois law is the dismissal of Petitioner's claims for fraud, malicious injury to property rights and conspiracy, that the best Petitioner can say in support of those claims is to characterize the state courts' interpretation of the facts and their application of state law to those facts as "arbitrary and capricious." This characterization is wholly insufficient to transform these exclusive state law determinations into substantial federal questions subject to review by this Court. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Murdock v. City of*

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[5] *continued*
because he failed to include them in his "Petition for Appeal as a Matter of Right and in the Alternative for Leave to Appeal" filed with the Illinois Supreme Court; the innocent construction rule is not mentioned and the *Chapski* decision is not even cited. (Under separate cover, Respondents have lodged with this Court a certified copy of the "Petition for Appeal as a Matter of Right and in the Alternative for Leave to Appeal.") In failing to present or argue these issues in his Petition to the Illinois Supreme Court, we submit, Petitioner has not presented these issues to the highest court in the state in which a decision could be had. The issues have therefore been waived and this Court should deny the writ. Matthews v. Huwe, 269 U.S. 262, 265-66 (1925) (failure to apply for discretionary review in state supreme court); Ill. Rev. Stat. ch. 110A, §§315(b)(3), 315(g), 341(e)(7) (issues not argued are waived under Illinois Supreme Court Rules); Beck v. Washington, 369 U.S. 541, 552-53 (1962) (failure to follow state court rules regarding presentation of issues is grounds to deny certiorari); Bailey v. Anderson, 326 U.S. 203, 206-07 (1945) (Supreme Court lacked jurisdiction to hear federal question improperly presented to state supreme court under state practice rules).

Memphis, 87 U.S. 590, 629 (1875) ("merely *raising*" federal question is insufficient) (emphasis in original).

3. The Lower Courts' Holdings With Respect To Opinion And The Dismissal Of Petitioner's Claims For Fraud, Malicious Injury To Property Rights And Conspiracy Are Neither "Arbitrary" Nor "Capricious."

Petitioner's talismanic use of the words "arbitrary" and "capricious" fails to raise the lower courts' findings on the issue of opinion to an issue of constitutional magnitude. As clearly stated by both lower courts, their holdings that the allegedly offending words were nonactionable statements of opinion were *alternative* grounds, mandating, in the case of the trial court, dismissal of the amended complaint, and, in the case of the Appellate Court, affirmance. Moreover, there is nothing "arbitrary" or "capricious" about the Appellate Court's ruling.

Signally, in *American Railway Express Co. v. Kentucky*, 273 U.S. 269 (1927), the only case upon which Petitioner relies in support of his contentions in Points II and III of his Petition that the rulings of the lower courts were arbitrary and capricious, this Court rejected a similar claim:

> The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this Court to revise the decisions of the state courts upon questions of state law.

Id. at 272-273 (*quoting Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157 (1917)). The Court further noted that:

> It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial conduct does not deprive the unsuccessful party of property without due process of law.

American Railway Express Co., 273 U.S. at 273.

In the case at bar, the lower courts simply determined, based on well-established legal standards, that Petitioner had failed to meet his threshold burden of alleging a false and defamatory statement of *fact*, as opposed to opinion. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974); *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977); *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 783 (9th Cir. 1980); *Spelson v. CBS Inc.*, 581 F. Supp. 1195, 1202-1205 (N.D. Ill. 1984); *Chapski v. Copley Press*, 92 Ill. 2d 344, 352, 442 N.E.2d 195, 199 (1982).[6] Moreover, the trial court's dismissal of Petitioner's claims for fraud, malicious injury to property rights and "conspiracy," and the Appellate Court's affirmance, were based exclusively on Illinois law, were rendered in the regular course of judicial conduct, and provide no basis for a claim of an "arbitrary and capricious" exercise of power. *American Railway Express Co. v. Kentucky*, 273 U.S. 269, 273 (1927). These holdings, we submit, were correct; however, even if they were erroneous, which we submit is not the case, the actions of the lower courts were not so bizarre or unusual as to constitute the "arbitrary and capricious" exercise of judicial power.[7]

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[6] The fair comment privilege, to which Petitioner addresses the bulk of his arguments in Point II of his Petition, was neither raised by Respondents nor decided by the trial or appellate courts. Thus, Petitioner's gratuitous gibes are not properly before the Court. In addition, Petitioner's "false implication rule" is a doctrine with which neither Respondents nor, insofar as we can determine, Illinois jurisprudence are familiar.

[7] As demonstrated in Petitioner's statement regarding the "Raising of Federal Questions in the Appellate Court of Illinois, First Judicial District" (Petition, pp. 16-19), Petitioner did not raise in the Appellate Court an issue with respect to an "arbitrary" or "capricious" exercise of power by the trial court regarding its ruling on opinion or its dismissal of Petitioner's state law claims for

(Footnote continued on following page)

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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April 25, 1985

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[7] *continued*
fraud, malicious injury to property rights and "conspiracy." Similarly, Petitioner failed to raise these issues in his Petition for Leave to Appeal to the Illinois Supreme Court with respect to the actions of the Appellate Court. The only "constitutional" issue with respect to opinion raised by Petitioner in the Illinois Supreme Court was "whether the fair comment rule is void as being in violation of the First Amendment to the United States Constitution." (Illinois Supreme Court Petition, p. 24, lodged herewith under separate cover.) As noted earlier, however, Respondents never claimed the fair comment privilege and the issue was not decided by any of the lower courts. This Court should decline jurisdiction for this additional reason.

APPENDICES

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APPENDIX A

ILLINOIS APPELLATE COURT OPINION

83-1798

Second Division
August 7, 1984

PAUL RENARD,

Plaintiff-Appellant,

v.

COLUMBIA BROADCASTING SYSTEM, INC., a corporation, CBS INC., a corporation, ROOSEVELT UNIVERSITY, a not-for-profit corporation, SUSAN ANDERSON, ROBERT WALLACE, HARRY PORTERFIELD, JAMES HATFIELD and SALLY BAUER,

Defendants-Appellees.

Appeal from the Circuit Court of Cook County.
Honorable **William R. Quinlan**, Judge Presiding.

JUSTICE STAMOS delivered the opinion of the court:

This is an action for libel, conspiracy to libel, malicious injury to property rights and conspiracy to maliciously injure property rights against all of the defendants, and for fraud and conspiracy to defraud against defendants Columbia Broadcasting System, Inc.; CBS Inc.; Harry Porterfield and James Hatfield. The trial court granted defendants' motion to dismiss plaintiff's amended complaint, finding that plaintiff had failed to state a cause of action under

section 2-615 of the Illinois Code of Civil Procedure. (Ill. Rev. Stat. 1979, ch. 110, par. 2-615.) Plaintiff appeals.

The instant case arose from the broadcast by defendants on April 13, 1980, of a public interest program entitled "Two on Two," which contained a segment describing plaintiff's "Music Dynamics" piano program and a 10-week Northwestern University beginning piano course. Plaintiff's program differs from the Northwestern program in that plaintiff teaches students to read and play music by responding to the numerical distances between notes, while the Northwestern course teaches through traditional methods. The stated purpose of the "Two on Two" segment was to examine beginning piano courses for adults who wished to attain a moderate level of skill in playing that instrument. Instructors and students from each school were interviewed and students were filmed while practicing. The Northwestern students were shown playing a simplified, rehearsed piece while plaintiff's students were shown playing complex pieces at first sight. The television audience was not informed of the different circumstances under which the students from the two schools were performing.

"Two on Two" concluded the segment by showing the tapes of the students to defendant Sally Bauer, an Assistant Professor of piano from Roosevelt University, and asking her opinion as to which program would be better for an adult who wished to attain a moderate level of skill in playing the piano. Mrs. Bauer responded:

> "from the tapes that we have seen of those two programs, they're without question, the musical level in the Northwestern program exceeds that of the other program. The people that you have spoken with and heard at Music Dynamics are very enthused about their work. But, I see greater independence musically in the works of the students at Northwestern."

The "Two on Two" commentator then stated:

> "Mrs. Bauer emphasized that the best way to judge any program is by whether it helps the student learn to play as well as he or she wants to learn. While a Music Dynamics student might to some ears sound a bit mechanical and lack complete musicianship, Mrs. Pauline Archias is quite satisfied. She began with Renard twelve years ago at age 68 after another piano instructor told her she was too old for lessons. Today, at 80, her playing brings enjoyment to her and her friends.

The segment concluded with advice on choosing a piano teacher, the commentators stating:

> "Experts we've talked with said go to an established college or school and attend a student recital. If the students play well, they probably have good teachers. Our expert said. 'don't automatically sign up for lessons at the store where you bought your piano, and don't pick a teacher just because he or she lives near you.'
>
> "If possible, select an instructor who belongs to the Illinois State Music Teachers Association. The membership is usually an assurance of quality."

Plaintiff filed a suit for libel, conspiracy to libel, malicious injury to property rights, conspiracy to injure property rights, fraud and conspiracy to defraud, alleging a conspiracy by defendants CBS and Roosevelt University and their employees and subsidiaries to injure plaintiff's reputation in order to benefit Roosevelt's music school and CBS's subsidiaries' sales of pianos and electronic organs. Defendants moved to dismiss plaintiff's original complaint and their motion was granted on October 4, 1982. Plaintiff thereafter filed an amended complaint and amendments thereto. Defendants again moved to dismiss under section 2-615 of the Code of Civil Procedure, and the trial court granted the motion with prejudice, finding that

plaintiff's complaint failed to state a cause of action. Plaintiff appeals.

The trial court dismissed plaintiff's amended complaint because it was insufficient as a matter of law to state a claim for libel and was therefore insufficient to state a claim for malicious injury to property rights, fraud or conspiracy. Plaintiff contends on appeal that his complaint adequately pleads libel *per se*. Words are considered libelous *per se* if they are so obviously and naturally hurtful that proof of injury is necessary. (See *Colson v. Stieg* (1980), 86 Ill. App. 3d 993, 995, 408 N.E.2d 431, *aff'd* (1982), 89 Ill. 2d 205, 433 N.E.2d 246.) The four categories of statements considered defamatory *per se* are set out in *Richardson v. Dunbar* (1981), 95 Ill. App. 3d 254, 419 N.E.2d 1205. According to plaintiff, the fourth category is applicable here: words that prejudice a particular person in the conduct of his profession or trade. See 95 Ill. App. 3d 254, 259.

Alternatively, plaintiff contends that his complaint sufficiently states a claim of libel *per quod*, a theory under which the plaintiff must prove an innuendo and allege special damages. (See *Bruck v. Cincotta* (1977), 56 Ill. App. 3d 260, 264, 371 N.E.2d 874; see also *Richardson v. Dunbar* (1981), 95 Ill. App. 3d 254, 260, 419 N.E.2d 1205.) We need not decide the question of whether this allegation sufficiently pleads libel *per se* or *per quod* because plaintiff's complaint is deficient on a more fundamental level; the words are not defamatory.

An exhaustive review of the law of defamation, particularly the innocent construction rule, was undertaken by our supreme court in *Chapski v. The Copley Press* (1982), 92 Ill. 2d 344, 442 N.E.2d 195. There the court concluded:

> "[A] written or oral statement is to be considered in context, with the words and the implications therefrom given their natural and obvious meaning; if, as so construed, the statement may reasonably be innocently interpreted . . . it cannot be actionable *per se*. This preliminary determination is properly a question of law to be resolved by the court in the first instance." 92 Ill. 2d 344, 352.

It is clear that the circuit court correctly determined as a matter of law that the "Two on Two" segment featuring plaintiff's music school was not defamatory. The segment merely examined two beginning piano courses and elicited an informal opinion from a third party as to the merits of each; it contained no false statemens of fact injurious to plaintiff's reputation. Furthermore, the trial court correctly held that the comments of Mrs. Bauer were, under any reasonable construction, merely her opinion as to the merits of the two music programs featured in the broadcast and thus were not actionable. See *Zaret v. Joliet Park District* (1980), 91 Ill. App. 3d 225, 227, 415 N.E.2d 659.

Because the remaining counts of plaintiff's amended complaint are dependent upon plaintiff's ability to state a claim for defamation, the trial court correctly held that these counts also failed to state a cause of action. Dismissal of a complaint for failure to state a cause of action is a matter within the discretion of the trial court. This rule applies equally to actions for defamatory damages. *Antonelli v. Field Enterprises, Inc.* (1983), 115 Ill. App. 3d 432, 436, 450 N.E.2d 876.

Plaintiff argues that Illinois' innocent construction rule is violative of due process and equal protection under the Federal and Illinois constitutions. This argument is clearly without merit, as the only authority cited by plaintiff in

support of this contention is *MacLeod v. Tribune Publishing Co.* (1959), 52 Cal. 2d 536, 343 P.2d 36, which condemns the same type of hair-splitting innocent construction decisions cited by our supreme court as the reason for its revision of the innocent construction rule in *Chapski.* Plaintiff's argument that suitors denied recovery for statements which can reasonably be innocently construed are denied equal protection and due process of law is unsupported by any authority and contradicts our supreme court's decision in *Chapski.*

Plaintiff next contends that the trial court erred in finding that his amended complaint failed to state a cause of action for fraud. Plaintiff's complaint alleged that defendants induced him to allow them to photograph and interview him and his students by fraudulently representing to plaintiff that the "Two on Two" segment would feature his music school exclusively.

Among the elements necessary for recovery for fraud is an injury caused by one party's reliance on the false representations of another. (See *Younger v. Revelle* (1979), 78 Ill. App. 3d 1, 4, 397 N.E. 2d 221.) We have previously determined that the trial court correctly held that plaintiff has not been defamed in the instant case. Therefore, plaintiff has suffered no injury as the result of any representations made by defendants and has not stated a cause of action for fraud or for conspiracy to defraud.

Plaintiff finally contends that the simultaneous representation by the same counsel of defendant Bauer and the remaining defendants is a prohibited conflict of interest and that the trial court erred in failing to take action to eliminate this conflict. Absent a complaint by the affected client, a party has no status to object to the representation of an adverse party by an attorney of his choice.

"Only a party who sustains a relation of client to an attorney who undertakes to represent conflicting interests may be entitled to object to such representation." *Murchison v. Kirby* (S.D.N.Y. 1961), 201 F. Supp. 122, 123-24 quoting 7 C.J.S. Attorney and Client §47, p. 827.

For the reasons expressed above, the decision of the circuit court is affirmed.

Affirmed.

Hartman, PJ., and Downing, J., concur.

APPENDIX B

CIRCUIT COURT OF COOK COUNTY'S ORDER

No. 81 L 8289

PAUL RENARD,

Plaintiff,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., et al.,

Defendants.

ORDER

This matter comes on to be heard on the motion of the defendants, CBS Inc., Columbia Broadcasting System, Inc., Susan Anderson, and other named individual defendants, to dismiss plaintiff's first amended complaint, as amended, pursuant to Section 2-615 of the Illinois Code of Civil Procedure, Illinois Revised Statutes, Chapter 110, Section 2-615.

The defendant, Roosevelt University, has also filed a motion to strike and dismiss pursuant to Section 2-615.

The court has heard the oral arguments of counsel, considered the memoranda submitted by the parties, and is duly advised in the premises.

Plaintiff has filed a six count complaint complaining of a "Two on Two" broadcast, which plaintiff asserts caused him to be libeled by the defendants.

The specific arguments of the defendant, Roosevelt University, will not be addressed inasmuch as the resolution of the contention of the defendants CBS Inc., et al., necessarily resolves the issues as they relate to Roosevelt.

The first amended complaint, as amended (hereinafter sometimes referred to as "the complaint") as characterized by the plaintiff, is for libel, conspiracy to libel, malicious injury to property rights, and conspiracy to maliciously injure property rights against all defendants; and in addition for fraud and conspiracy to defraud against the defendants, CBS Inc., et al.

The gist of the plaintiff's complaint leading to the six count complaint is that the "Two on Two" broadcast was understood by its viewers to mean as set forth in paragraph 13 of the first amended complaint, as amended that the plaintiff and his school "were so completely lacking in knowledge, competence, and ability in connection with the teaching of the playing of the piano, and organ, and in the selection and use of teaching programs, materials and equipment in connection with such teaching, that it would be better for someone anxious to learn to play the piano or organ for fun, but also to play well, to merely take a ten week program in beginning piano for adults at Northwestern University rather than taking lessons from the plaintiff and his staff at his school for as long as two or three years, since adults who had taken lessons in the playing of the piano and organ from the plaintiff and his teaching staff at his school for two or three years, after such time still might sound a bit mechanical and lack complete musicianship, still has not reached a musical level equal to that in a ten week program in beginning piano for adults at Northwestern University, and still did not even have as much independence musically as the

works of students in the said Northwestern University program." Further, that these statements were false.

The plaintiff alleges that the broadcast was thus libelous per se, constituted libel per quod, that the opinions expressed on the program were not privileged, and that the program could not be innocently construed.

Attached to this order as Appendix A is a copy of the broadcast as is set forth in paragraph 13 of plaintiff's first amended complaint, as amended.

The defendants assert that the broadcast is neither libelous per se, libel per quod, or otherwise actionable, but merely an expression of opinion, and also non-actionable under the innocent construction rule.

Inasmuch as the other allegations are all inextricably intertwined with the libel allegations, the defendants contend that they, too, must fail.

To state a claim for libel, statements, or in this case the broadcast, must in the first instance be defamatory.

Defamatory statements are either libelous per se or per quod. *Bruck v. Cincotta*, 56 Ill.App.3d 260, 371 N.E.2d 874 (1977).

Words in a publication are considered libelous per se if they are so obviously and naturally hurtful that proof of injury is unnecessary. *See Springer v. Harwig*, 94 Ill. App.3d 281, 418 N.E.2d 870 (1981).

In that case proof of an injury is dispensed with, and damages are presumed. *Kirk v. Village of Hillcrest*, 31 Ill.App.3d 1063, 335 N.E.2d 535 (1975).

Words are libelous per quod if false, but require an innuendo to give them a libelous meaning, and require evi-

dence to show that as a matter of fact some substantial injury has followed from their use. *Kirk, supra.*

A statement is libelous per se if it falsely imputes (1) the commission of a criminal offense; or (2) an infection with a communicable disease, if true, would exclude one from society; or (3), inability to perform or want of integrity in the discharge of duties of office or employment; or (4) such as to prejudice a particular person in his profession or trade. *Richardson v. Dunbar*, 95 Ill.App.3d 254, 259, 419 N.E.2d 1205 (1981).

According to the plaintiff the fourth category is here, namely words that prejudice a particular person in the conduct of his profession or trade.

Alternatively the plaintiff argues the complaint sufficiently states a claim of libel per quod. Whether the plaintiff's complaint sufficiently pleads libel per se or per quod is not material, for it is deficient on a more fundamental ground. The words simply are not defamatory.

Dismissal of a complaint for libel is warranted if the words claimed to be defamatory are not reasonably or fairly capable of the meaning assigned to them by the plaintiff. *Allen v. Ali*, 105 Ill.App.3d 887, 435 N.E.2d 167 (1982).

It is for the court to decide in the first instance whether the alleged defamatory statements were reasonably capable of the meaning ascribed to them. *Compare Richardson v. Dunbar*, 95 Ill.App.3d 254, 419 N.E.2d 1205 (1981) *and Allen v. Ali*, 105 Ill.App.3d 887, 435 N.E.2d 167 (1982).

Further, the principles as set forth in the application of the innocent construction rule are pertinent here. "[A]

written or oral statement is to be considered in context, with the words and the implications therefrom given their natural and obvious meaning; if as so construed, the statement may reasonably be innocently interpreted . . . it cannot be actionable per se." *Chapski v. Copley Press*, 92 Ill.2d 344, 352, 442 N.E.2d 195, 199 (1982).

Accordingly the court finds that the statements in the broadcast are not fairly and reasonably capable of the construction placed on them by the plaintiff, but rather plaintiff's construction is unreasonable. *Compare Allen v. Ali*, 105 Ill.App.3d 887, 435 N.E.2d 167 (1982), *Rasky v. Columbia Broadcasting System, Inc.*, 103 Ill.App.3d 577, 431 N.E.2d 1055 (1981), *Richardson v. Dunbar*, 95 Ill.App.3d 254, 419 N.E.2d 1205 (1981) and *Bruck v. Cincotta*, 56 Ill.App.3d 260, 371 N.E.2d 874 (1977).

The contents of the broadcast, in the context presented here can best be said to be an innocuous presentation regarding two programs for people who wanted to play the piano for enjoyment, or fun, and not to develop a professional skill.

At worst, the comments of Mrs. Bauer were her opinion of which program exceeded the musical level of the other, and are thus not actionable. *See Zeret v. Joliet Park District*, 91 Ill.App.3d 225, 415 N.E.2d 659 (1980) and *Byars v. Kolodziej*, 48 Ill.App.3d 1015, 363 N.E.2d 628 (1977). Therefore, the plaintiff's complaint is insufficient as a matter of law to state a cause of action for libel.

Additionally, the plaintiff's other alleged claims for relief are dependent upon the plaintiff's ability to state a claim for defamation, and they, too, accordingly fail to state a cause of action.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT the defendants' motions to strike and dismiss counts one through six of plaintiff's first amended complaint, as amended, pursuant to Section 2-615, are granted. As this court has found that the statements in the broadcast as viewed under the applicable principles are not defamatory, the motions to strike and dismiss are granted with prejudice, and the first amended complaint, as amended, is dismissed. All parties shall bear their own costs.

ENTER:

/s/ William R. Quinlan
Circuit Judge

Dated: June 23, 1983

APPENDIX C

APPENDIX TO CIRCUIT COURT OF COOK COUNTY'S ORDER– TRANSCRIPT OF "TWO ON TWO" BROADCAST

ANDERSON: "Along with people who are tuning up their bodies, you'll meet some Chicago area music lovers who are tuning up their pianos and learning how to play them."

WALLACE: "Saloons in the 'Old West' used to have signs that read: 'Don't shoot the piano player, he's doing the best he can.' Well, there's a new market for those signs, and the reason is that all across the nation, adults are doing something they always wanted to do but never had the time for—learn how to play that piano in the family room."

(Picture of Vladimir Horowitz playing the piano)

WALLACE: "No, this man doesn't take lessons. He's Vladimir Horowitz. He is to the private pianist as Jack Nicklaus is to the Saturday golfers. And it's much in that vein that adults are flocking to the piano bench these days, not to become a Horowitz or a Brubeck but simply to have fun.

"And one of the best ways to have fun taking lessons is with a group. How, you ask, can you learn piano with a roomful of other students banging away on the keyboard?

"Well, at the Northwestern University Music School electronic piano lab, it's easy."

(Picture of Jane McGraw speaking)

JANE McGRAW: "With these buttons, I can tune in and hear everyone in the class at once. I can hear just

one person playing at once or I can fix it so that they can hear me and I can't hear them so they can try out what I'm talking about."

WALLACE: "Instructor Jane McGraw teaches a 10 week program in beginning piano for adults. It costs $80 and is open to the public.

"The night we visited the class, students were busy at work on a simplified version of Brahm's 'Lullaby'.

"Instructor McGraw says her goal is to offer a balanced program that includes sight reading and understanding a basic musical principle. Does she expect to turn out a Horowitz?"

McGRAW: "No, this is purely for fun, but if one is developed at this point, I would make sure they knew it, the teacher."

WALLACE: "Among the students is Jerome Cohens, a Professor of Engineering who says his musical goals are at this point modest, but practical."

(Picture of Jerome Cohens speaking)

COHENS: "My goal is at Christmas parties, to be the guy they bring the drinks to."

WALLACE: "Scott Myers works in a Chem-Lab at Northwestern. He's had music lessons before on the clarinet, so he knows the difference between studying individually and with a group."

(Music in background—Picture of Scott Myers speaking)

MYERS: "You can have one-on-one instructions and yet, whenever the teacher chooses, you can hear how everybody else is doing and compare yourself."

WALLACE: "Marsha Mataval is a late comer to piano lessons, even though her family has had a piano for some time. Daughter, Sarina, is several years ahead of her at the keyboard and now Mom would like to catch up."

(Picture of Marsha Mataval speaking)

MATAVAL: "I'd like to be able to play some duets with my daughter and share the musical experience with her. That would be nice."

SARINA: "She doesn't practice too often and when she does practice, she tells me and my dad to keep quiet and now we don't have any fun."

(Laughter)

WALLACE: "The Northwestern program does stress practice. Francis Larrimer, Head of piano instruction of the school, says they're really are no shortcuts around it."

(Picture of Francis Larrimer speaking)

LARRIMER: "Playing a musical instrument, is very much like athletics. It requires a great deal of physical coordination and in order to develop facilities, one must work at it daily."

(Picture of Fine Arts Building)

WALLACE: "Not every music instruction program emphasizes practice however. In fact, for many, that's one of the most attractive aspects of Music Dynamics, nationwide piano school run by Paul Renard, who likens himself to Evelyn Wood, the high (inaudible) of speed reading.

"Renard's program of instruction is just that, he says. Programmed learning, which teaches students to sight read music without learning notes or scales. It's more like learning to type, he says. Renard explained part of his system to Harry Porterfield."

(Picture of Paul Renard speaking and demonstrating to Harry Porterfield.)

RENARD: "What the note's name is, is not important—only where—because we're looking for a location. So, that what we do here, in our picture, it's what we call intervals or distance between notes.

"You as a violinist know those because a violinist has to use them, as does a trombonist or a cellist. So, the interval becomes the distance between two notes and we

teach the individual to see these differences. So, for instance, these notes here would go; (DEMONSTRATES) D, 2nd, 2nd, 2nd. (MUSIC) And this would be 2nd again. It's the distance from note to note."

WALLACE: "Renard's system also incorporates something called Picture, Pulse and Anchor, which he says will enable a student to play simple tunes in as few as seven hours. The key to it all, he explains, is starting simply and proceeding gradually."

RENARD: "It's like anything else. It's a cinch by the inch, and hard by the yard, and we prefer to go slowly and give them a chance to get used to things. And, it's not hard to do. For most people, it's only hard to accept that it might be easy."

(Music in Background)

WALLACE: "Renard's lessons cost $12 an hour. He and his teaching staff see hundreds of students a week in Chicago alone. Most are adults like Peggy Ryan of Woodridge, an accountant with CNA Insurance. She started organ lessons with Music Dynamics two years ago, and believes she's made a lot of progress."

(Picture of Peggy Ryan playing the Berceuse from the opera "Joslyn")

RYAN: "I'm saying that my husband never listened to my organ playing when I first started. I used to put his headphones on his stereo and now he sits down in the chair and listens to me when I play. So, I feel I must have improved."

WALLACE: "Gaylon Sprimont is a 48 year old real estate salesman from Chicago. He's studied organ at Music Dynamics for three years. A year ago, he took up the piano too."

(Picture of Sprimont playing the Clementi Sonatina No. 1)

SPRIMONT: "I wanted a shortcut. I didn't want to do the scales and spending hours in labor or practicing at home. I didn't have time for it. So, I began three years ago on the organ with Paul and it's been very rewarding. It's exactly what I've been looking for.

WALLACE: "After hearing students from Music Dynamics and from Northwestern play, we wondered which program might be the better for someone anxious to learn to play for fun, but also play well. Sally Bower is an Assistant Professor of Piano at Roosevelt University's Chicago Musical College. We showed her tapes of students from both Music Dynamics and Northwestern's Beginning Adult Class."

BAUER: "From the tapes that we have seen of those two programs, they're without question, the musical level in the Northwestern program exceeds that of the other program. The people that you have spoken with and heard at Music Dynamics are very enthused about their work. But, I see greater independence musically in the works of the students at Northwestern."

WALLACE: "Mrs. Bower emphasized that the best way to judge any program is by whether it helps the student learn to play as well as he or she wants to learn. While, a Music Dynamics student might to some ears sound a bit mechanical and lack complete musicianship, Mrs. Pauline Archias is quite satisfied. She began with Renard 12 years ago at age 68, after another piano instructor told her she was too old for lessons. Today at 80, her playing brings enjoyment to her and her friends."

(Picture of Pauline Archias playing the theme from Dr. Zhivago)

ARCHIAS: "I have them—my ladies group over at my house, they like to come to my place because I play the organ for them."

WALLACE: "That's one of the things Mrs. Archias says her lessons have brought her. But, she places even more emphasis on something else."

ARCHIAS: "My family is so proud of me."

ANDERSON: "So, how do you pick a good piano teacher? Experts we've talked with said go to an established college or school and attend a student recital.

"If the students play well, they probably have good teachers.

"Our expert said, 'don't automatically sign up for lessons at the store where you bought your piano, and don't pick a teacher just because he or she lives near you.' "

WALLACE: "If possible, select an instructor who belongs to the Illinois State Music Teachers Association. That membership is usually an assurance of quality. As for cost, expect to pay $12 to $50 an hour or so.

"Good luck, and kids, don't shoot the piano player, Mom and Dad are doing the best they can!"

APPENDIX D

ILLINOIS STATUTES

Ill. Rev. Stat. ch. 110A, § 315(b)(3)

Leave to Appeal from the Appellate Court to the Supreme Court

(b) Time; Contents . . . . The petition for leave to appeal shall contain, in the following order:

* * *

(3) a statement of the points relied upon for reversal of the judgment of the Appellate Court.

* * *

Ill. Rev. Stat. ch. 110A, § 315(g)

Leave to Appeal from the Appellate Court to the Supreme Court

(g) Briefs. If leave to appeal is allowed, the appellant may allow his petition for leave to appeal to stand as his brief, or may file a brief in lieu of or supplemental thereto.

* * *

Briefs, pleadings and other documents filed with the Supreme Court in cases covered by this rule shall to the extent appropriate conform to Rules 341 and 344.

Ill. Rev. Stat. ch. 110A, § 341(e)(7)

Briefs

(e) Appellant's Brief. The appellant's brief shall contain the following parts in the order named:

* * *

(7) Argument, which shall contain the contentions of the appellant and the reasons therefor . . . . Points not argued are waived and shall not be raised in reply brief, in oral argument, or on petition for rehearing.